

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ALICIA A. EISENBEISS and JEFFREY C. EISENBEISS,

Appellants,

v.

APPEAL NO. 33376

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;
BEECH RIDGE ENERGY, LLC; WEST VIRGINIA
STATE BUILDING AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO,**

Appellees,

and

MOUNTAIN COMMUNITIES FOR RESPONSIBLE ENERGY,

Appellant,

v.

APPEAL NO. 33375

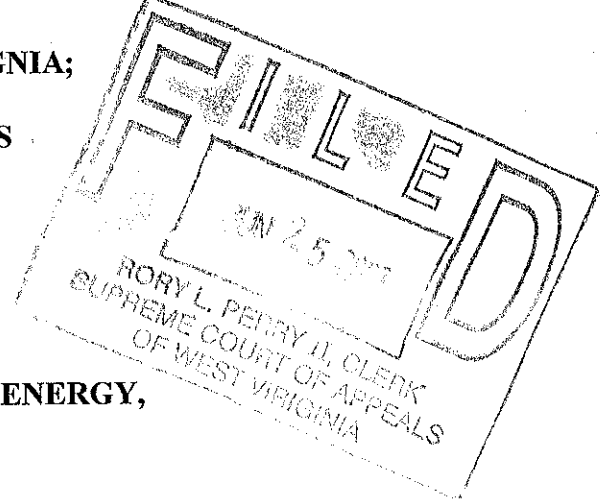
**PUBLIC SERVICE COMMISSISON OF WEST VIRIGNIA;
BEECH RIDGE ENERGY LLC; and WEST VIRGINIA
STATE BUILDING CONSTRUCTION TRADES COUNCIL,
AFL-CIO,**

Appellees.

**ON APPEAL FROM THE PUBLIC SERVICE COMMISSISON OF WEST VIRGINIA
CASE NO. 05-1590-E-CS**

**BRIEF *AMICUS CURIAE* OF
UTILITIES, TELECOMMUNICATIONS AND ENGERY
COALITION OF WEST VIRGINIA, INC.**

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INTRODUCTION

The Utilities, Telecommunications and Energy Coalition of West Virginia, Inc. ("UTECH") submits this brief in support of the briefs of Appellees, the West Virginia Public Service Commission ("Commission") and Beech Ridge Energy, LLC ("Beech Ridge Energy"). UTECH member, Appalachian Power Company has also submitted a brief *amicus curiae*, which such brief UTECH fully supports and endorses. UTECH member-businesses, virtually all of which are concurrently regulated by the Commission and various other state, federal and local governmental agencies and entities, believe that their experience in this regard and the argument contained in this brief will assist this honorable Court in reaching its decision herein.

ARGUMENT

1. THE COMMISSION DID NOT ERR IN ITS ASSESSMENT OF THE VIEW SHED ISSUES IN THIS CASE BECAUSE WEST VIRGINIA LANDOWNERS DO NOT HAVE THE RIGHT TO PROTECT OR PRESERVE AN UNOBSTRUCTED VIEW ACROSS THE PROPERTY OF AN ADJACENT LANDOWNER.

Appellants oppose the Beech Ridge Energy project because they insist that the wind turbines will degrade adjacent landowners' countryside view. They say that the Commission's acceptance of Beech Ridge Energy's view shed study "entirely disregards the landscape and dynamics of the proposed project." (Appellant's Brief at 13.) To support this argument, Appellants declare that the Staff of the Commission did not "confirm the accuracy of the applicants [sic] view shed study." (*Id.* at 7 (internal quotation marks omitted).) *Ergo*, Appellants contend that the Commission's Order, dated May 5, 2006, is fatally flawed. More specifically, Appellants argue that the applicant's view shed is unreliable because (i) there is no credible evidence of its accuracy, (ii) the study minimizes the perceived impact of the project on the view shed of the neighboring landowners, (iii) the view shed maps are "completely flawed," and (iv) the view shed study is not based on "thorough on site research." (*Id.* at 12-13.)

The Appellants' criticism of the Commission's assessment of the view shed issue in this case assumes that West Virginia landowners have a "bundle of rights" that include the right to bring a cause of action to protect an unobstructed view across another's property. English common law provided such a right under the "doctrine of ancient lights." This doctrine provided a cause of action to enforce an "easement of view" that would protect a landowner from a neighbor "who would erect structures blocking light or air from the landowner." *City of Wichita v. McDonald's Corp.*, 971 P.2d 1189, 1198 (Kan. 1999). However, the English doctrine of "Ancient Lights" has been universally repudiated in the United States." *Omnipoint Communications, Inc. v. City of White Plains*, 202 F.R.D. 402, 403-04 (S.D.N.Y. 2001). In West Virginia, the ancient lights doctrine is expressly rejected by statute. See, W. VA. CODE § 2-1-2 (2006). Since the doctrine of ancient lights has been rejected, "[i]t has been thought to follow that there is no duty to avoid blocking someone's view, scenic or otherwise." *Justice v. CSX Transp., Inc.*, 908 F.2d 119, 122 (7th Cir. 1990) (emphasis added). Therefore, the Appellant's criticism of the Commission's assessment of the view shed issues pertaining to the Beech Ridge Energy is not supported by West Virginia law.

2. THE COMMISSION CANNOT REVIEW THE PROPRIETY OF JUDGMENTS MADE BY OTHER INDEPENDENT GOVERNMENTAL AGENCIES

Appellants insist that the Commission abused its discretion by failing to conduct a thorough, independent review of every aspect of the appropriateness of Beech Ridge Energy's application for a siting certificate. This argument insinuates that the Commission has an affirmative duty to assess the propriety of judgments made by other government agencies. The Commission is a statutory entity created by the Legislature. As such, the Commission "has no jurisdiction and no power or authority except as conferred on it by statute and necessary implications therefrom It has no inherent power or authority." *Casey v. Public Serv. Comm'n of West Virginia*, 193 W. Va. 606, 607, 457 S.E.2d 543, 544 (1995) (Syllabus point 2

by the Court). The Commission's enabling statute declares that "[t]he Legislature creates the public service commission to exercise the legislative powers delegated to it." W. VA. CODE § 24-1-1(b) (2004). However, the Legislature has not delegated to the Commission the authority to trespass on the jurisdiction of government agencies that are unrelated to and independent of the Commission. "The regulatory authority of the Public Service Commission over public utilities . . . is not unlimited." *West Virginia Citizen Action Group v. Public Service Comm'n of West Virginia*, 175 W. Va. 39, 43, 330 S.E.2d 849, 852 (1985).

The West Virginia Code is very specific in its definition of the Commission's limited jurisdiction and authority. The Commission was created to regulate public utilities. *Id.* at § 24-1-1. The Commission's jurisdiction extends to the regulation of utilities engaged in the generation and transmission of electrical energy. *Id.* at § 24-2-1(a). In this regard, no public utility shall begin the construction of any facility for the generation or transmission of electrical energy in this state without first obtaining from the Commission "a certificate of public convenience and necessity" *Id.* at § 24-2-11(a). The Code further empowers the Commission to issue siting certificates for the construction of facilities that generate electrical energy. *Id.* at § 24-2-11c. In order for the Commission to carry out these statutory directives, the Legislature empowered the Commission to promulgate such rules as it may deem proper. *Id.* at § 24-2-11(h). The Legislature has not, however, directed or authorized the Commission to review the determinations and rulings of other governmental agencies regarding the construction of facilities that generate electrical energy.

Pursuant to its enabling statute, the Commission has adopted legislative rules governing the issuance of siting certificates for exempt wholesale electric generators, such as that proposed by Beech Ridge Energy. *See* W. VA. C.S.R. § 150-30-1 *et seq.* (2007). These rules, along with the related criteria and conditions adopted by the Commission, require that a utility seeking a

siting certificate provide the Commission with extensive documentation pertaining to the proposed project. This documentation includes proof of compliance with the rules and laws of other government entities as evidenced by permits, certifications, guaranties, letters, and other papers, as well as the status of the respective approval applications filed with all governmental entities having jurisdiction over any aspect of the proposed project. The governmental agencies from whom the applicant must obtain the documentation required by the Commission include the West Virginia Department of Environmental Protection, the West Virginia Divisions of Natural Resources, and Culture & History, the State Historic Preservation Office, and the pertinent West Virginia County Commission(s). Documentation from the U.S. Fish & Wildlife Service and the Federal Energy Regulatory Commission must also be produced. Additionally, the proposed project must comply with the federal Endangered Species Act, Migratory Bird Act, requirements of the Federal Aviation Administration and, if applicable, the National Environmental Policy Act of 1969. The information and documentation required by the Commission in support of siting permits, such as that applied for by Beech Ridge Energy, is exhaustively comprehensive. Nevertheless, neither the Commission's enabling statute nor the Commission's rules, criteria, or conditions provide for a review by the Commission of the propriety of judgments made by other governmental agencies regarding issues that are not within the Commission's jurisdiction. The Commission is not vested with the authority to review and evaluate the appropriateness of the actions and decisions of other independent governmental agencies. To empower the Commission with this authority would be to create administrative chaos within the process of governmental permitting. If the Commission had the power of *de novo* review of the judgments and actions of other independent governmental agencies, public and private entities would not know where to turn for approval of proposed projects and actions, and the process of governmental permitting would be fraught with inconsistent and unpredictable standards and

conflicting agency directives thereby making it impossible to identify the ultimate authority on any particular permit.

Different agencies are created by the Legislature and each are granted specific duties and powers to address and regulate the multitude of issues, proposals, and problems that government must contend with every day. These agencies are independent and have the authority to address matters within their expertise. The judgments of these independent agencies are subject to review by the courts. The Commission is the principal regulatory agency for public utilities. But, utilities also must deal with other agencies because their activities cross a variety of media and disciplines. Each independent agency is charged by the Legislature to hold accountable public utilities for the particular subject matters that fall within the province of their expertise and legislative assignments.

This Court has recognized that “[t]he general powers of the legislature, within constitutional limits, are almost plenary.” *Wampler Foods, Inc. v. Workers’ Compensation Division*, 216 W. Va. 129, 602 S.E.2d 805 (2004) (Syllabus point 11 by the Court). *Wampler* explains the “police power” of state government is to promote the welfare of its citizens by enacting laws within constitutional limits. 216 W. Va. at 144, 602 S.E.2d at 820. The legislative assignment of regulatory authority to the Commission and other government agencies is an exercise of this police power.

As a creature of statute, administrative agencies have no authority except as provided by statute. *W. Va. Public Employees Insurance Board v. Blue Cross Hospital Serv., Inc.*, 174 W.Va. 605, 328 E.E.2d 356 (1985) (citing *Eureka Pipeline Co. v. Public Service Commission*, 148 W.Va. 674, 682, 137 S.E.2d 200, 204 (1964)). “It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative

agency may not issue a regulation which is inconsistent with, or which alters . . . its statutory authority.” *Crist v. Cline*, 219 W. Va. 202, 632 S.E.2d 358, 366 (2006) (citations and internal quotation marks omitted). So long as an administrative agency’s interpretation of its enabling statute is not clearly erroneous or excessive of its constitutional limitations, great deference must be accorded to the agency’s rules and regulations. *See State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). Under this authority, it is clear that the Legislature acted properly in assigning to the Commission the principal authority to regulate public utilities. The statute establishing the Commission and defining its duties and authority does not, however, authorize the Commission to assess the propriety of judgments made by other administrative agencies.

The Commission, as an extension of its enabling statute, has adopted rules and regulations for the granting of siting permits for electrical generation facilities. These rules and regulations do not include any provisions that would enable the Commission to review the legitimacy of permits, certificates, guaranties, or letters issued by another governmental agency. In fact, any attempt by the Commission to alter its statutory authority by second guessing the judgment of another independent governmental agency would be excessive of its statutory authority and, therefore, a clearly erroneous action. Hence, any suggestion that the Commission’s duty to assess applications for siting certificates includes an obligation to assess the propriety of the judgments of other governmental agencies is not supported by the applicable law.

WHEREFORE, your *amicus curiae* respectfully urges the Court to affirm the Public Service Commission’s grant of a siting certificate to Beech Ridge Energy LLC.

Respectfully submitted,

**UTILITIES, TELECOMMUNICATIONS AND
ENERGY COALITION OF WEST VIRGINIA, INC.**

AMERICAN ELECTRIC POWER COMPANIES

WASTE MANAGEMENT OF WEST VIRGINIA, INC.

MOUNTAINEER GAS

COLUMBIA GAS TRANSMISSION CORP.

**WEST VIRGINIA OIL & NATURAL GAS
ASSOCIATION**

INDEPENDENT OIL & GAS ASSOCIATION

WEST VIRGINIA AMERICAN WATER

ALLEGHENY ENERGY

SUDDENLINK COMMUNICATIONS

DOMINION RESOURCES

**WEST VIRGINIA CABLE &
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